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No. 05-736

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, Acting Secretary,
California Department of Corrections and Rehabilitation,
Petitioner,

- v. -

RAYMOND RAMIREZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. The petition presents the question whether a federal court of appeals has the authority to issue a certificate of appealability under 28 U.S.C. § 2253, and then vacate the denial of habeas relief, based on a claim that the habeas petitioner had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability. However, as we explain in this brief, that question is not in fact presented by this case since the claim was fully exhausted in state court prior to the Ninth Circuit's decision, and the Ninth Circuit merely determined that the claim had been sufficiently raised after liberally construing the *pro se* filings as this Court said it must do.

2. The petition presents the question whether it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment challenge when he never attempted to develop those facts as part of such challenge in the state court. However as we explain in this brief, that question is not in fact presented by this case since those facts may have been developed in state court and the Ninth Circuit decision does not require a violation of § 2254(e)(2).

3. Whether any prisoner who has received a life sentence under California's Three Strikes law can ever be granted relief in federal habeas corpus on the ground that his sentence violates the Eighth Amendment's proscription on cruel and unusual punishment, in light of *Lockyer v. Andrade*, 538 U.S. 63 (2003).

LIST OF PARTIES

The original parties in the district court and the Ninth Circuit were Raymond Ramirez and Cal Terhune, then-Director of the California Department of Corrections. Jeanne S. Woodford, Acting Secretary of the California Department of Corrections and Rehabilitation, has been substituted for Mr. Terhune as petitioner in this Court. Mr. Ramirez is the respondent in this Court.

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I

There is no need for this Court to review the question whether a federal court of appeals has the authority to issue a certificate of appealability under 28 U.S.C. § 2253, and then vacate the denial of habeas relief, based on a claim that the habeas petitioner had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability because (1) the claim was fully exhausted in state court prior to the Ninth Circuit's decision, and (2) the Ninth Circuit properly determined that the claim had been sufficiently raised after liberally construing Mr. Ramirez's *pro se* filings as it was required to do. 7

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II

There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Ramirez did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court. 14

III

There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time. 18

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IN THE SUPREME COURT OF THE UNITED STATES

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JEANNE S. WOODFORD, Acting Secretary,
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- v. -

RAYMOND RAMIREZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner presents three questions it asks this Court to review. This Court should decline review of all three. The first claim petitioner raises – that a federal court of appeals has no authority to issue a certificate of appealability under 28 U.S.C. § 2253, and then vacate the denial of habeas relief, based on a claim that the habeas petitioner had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability – should not be reviewed because (1) Mr. Ramirez's Eighth Amendment claim was fully exhausted in state court prior to the Ninth Circuit's decision, and (2) the Ninth Circuit properly determined that the claim had been sufficiently raised in Mr. Ramirez's petition and certificate of appealability after liberally construing Mr. Ramirez's *pro se* filings as it was required to do under this Court's precedents.

Petitioner's second claim – that it violates the limitations of 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court – need not be reviewed by this Court because the issue is simply not presented in this case. Petitioner's claim is premised on an assumption that Mr. Ramirez did not attempt to develop facts underlying his prior convictions in state court and may not do so now. But the record supports no such premise. To the contrary, the record suggests that such fact development did occur in the state court but was not included in the record before the Ninth Circuit. Either way, all the Ninth Circuit rather unremarkably has done in this case is to say it cannot properly review the Eighth Amendment claim raised by Mr. Ramirez because the record before it is incomplete, and to remand to the district court to allow it to develop the record further and to determine in the first instance whether Mr. Ramirez is entitled to relief. Should the state have a legitimate argument for why Mr. Ramirez should be precluded from adducing such evidence, it may raise it and litigate it before the district court. There is no reason for this Court to address a claim that may not exist.

With respect to petitioner's third claim – that in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence – review should be denied because (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, and there is no need for this Court to step in at this time.

Accordingly, because this Court does not sit to issue advisory opinions nor to engage in error correction, the petition for a writ of certiorari should be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. B2-B3) is not reported in the Federal Reporter. It can be found at 128 Fed. Appx. 663 (9th Cir. 2005).

JURISDICTION

The opinion and judgment of the court of appeals was filed on May 13, 2005. A petition for rehearing en banc was denied on September 6, 2005. This petition for a writ of certiorari was filed on December 5, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Factual Background.

On September 30, 1995, Ontario, California, police officers Michael Bors and Douglas Reed were on bicycle patrol. At approximately 9:00 p.m., Officer Bors saw a red Camaro drive into the parking lot of the Western Inn Hotel. Raymond Ramirez got out of the rear seat on the driver's side and walked into the lobby; the vehicle left the parking lot. Approximately 30 seconds later, Ramirez exited the hotel and walked to a pay phone. After he left the pay phone, Ramirez was stopped by the officers. They asked him if he would talk to them; Ramirez agreed. (ER 8-9).[1] Officer Bors observed that Ramirez's speech was rapid and his pupils appeared dilated and his lips dry and caked. Bors believed Ramirez was possibly under the influence of a

[1] "ER" followed by a number refers to the applicable page in the Excerpts of Record filed in the Ninth Circuit. "SER" followed by a number refers to the applicable page in the Supplemental Excerpts of Record filed in the Ninth Circuit.

controlled substance. Asked if he had used any speed or cocaine, Ramirez responded that he had used methamphetamine within the last few hours. (ER 10-11).

Following this admission, Ramirez was arrested and searched. In his left front pants pocket, the police found a small plastic bag containing a small amount of amphetamine, approximately 0.29 gram in weight. (ER 11- 12, 13-14). Officer Bors testified that this amount was sufficient for use and had a street value of approximately $30.00. Blood tests of Ramirez revealed traces of amphetamine and methamphetamine. (ER 15-16).

Under California law, possession of a controlled substance is referred to as a wobbler. It can be sentenced as either a misdemeanor or a felony. Punishment can range from less than one year in a county jail or up to three years in a state prison. Cal. Health & Safety. Code § 11377(a); Cal. Penal Code § 18. Nevertheless, under California's Three Strikes law, the possession charge became the basis for imposing a sentence of 25 years to life on Ramirez. Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d).[2] Ramirez has two prior felony convictions, both for the non-violent offense of burglary.

State Court Proceedings.

On November 1, 1995, a two-count information was filed in the San Bernardino County Superior Court charging Raymond Ramirez with possession of 0.29 gram of methamphetamine, in violation of Cal. Health & Safety Code § 11377 (a), and with being under the influence of

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[2]California's Three Strikes law consists of two substantively identical sentencing statutes. Both were enacted in 1994, one by the California Legislature, Cal. Penal Code § 667(b)-(i), and the other by ballot initiative, Cal. Penal Code § 1170.12. See generally In re Cervera, 24 Cal.4th 1073, 103 Cal.Rptr.2d 762 (2001). Under the law, defendants with prior qualifying convictions ("strikes") are subjected to longer terms of imprisonment than those without such prior convictions. Id. at-179.

methamphetamine, in violation of Cal. Health & Safety Code § 1 1550(a). The information also alleged two prior convictions in violation of California's "Three Strikes" law, Cal. Penal Code §§ 1170.12(a)-(d), and 667(b)-(i). The same prior convictions were also alleged as prior prison term enhancements under Cal. Penal Code § 667.5(b). (ER 3-4).

Following jury trial, Mr. Ramirez was found guilty as charged on both counts and the prior conviction allegations were found true. (ER 17-19).

At sentencing on May 15, 1996, Mr. Ramirez moved to have the court reduce the felony conviction to a misdemeanor in the interests of justice pursuant to Cal. Penal Code § 17(b)(5). This motion included the contention that a sentence of 25 years to life constituted cruel and unusual punishment under both the United States and California Constitutions. The court denied Ramirez's motion, (ER 20), and sentenced him pursuant to the Three Strikes law to 25 years to life in prison. (ER 21).

Mr. Ramirez appealed. In an unpublished opinion filed on July 30, 1997, the California Court of Appeal, Fourth District, Division Two, affirmed the conviction, but remanded the case for the sentencing court to exercise its discretion pursuant to People v. Superior Court (Romero), 13. Cal.4th 497 (1996). At resentencing after remand, the judge noted that Ramirez's non-violent, mostly misdemeanor criminal activity seemed "to be almost exclusively drug related." (ER 23). The probation department submitted an amended probation report recommending that the court dismiss one of the prior felony conviction strikes so that Ramirez would not face a Three Strikes sentence. Probation noted that the instant offense was relatively minor and that a sentence of 25 years to life appeared to be "extreme." (ER 24). Despite the probation department's recommendation, the court resentenced Ramirez as a third striker.

Mr. Ramirez appealed again. In an unpublished opinion filed on July 16, 1999, the California Court of Appeal affirmed the resentencing in all respects. On September 22, 1999, the California Supreme Court denied Ramirez's petition for review. Mr. Ramirez is now serving 25 years to life in prison, and may likely spend the rest of his life there.

On March 11, 2002, Mr. Ramirez filed a petition for writ of habeas corpus in the California Supreme Court, in which he argued that his sentence was cruel and unusual punishment in violation of the Eighth Amendment. (SER 18-58). On November 13, 2002, the California Supreme Court denied the petition. (SER 59).

Federal Habeas Corpus Proceedings.

On April 4, 2000, Mr. Ramirez filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Central District of California. (ER 25- 58). In that petition, Ramirez challenged the Three Strikes sentence imposed and claimed that the resentencing court failed to consider all of the relevant factors when it decided not to dismiss one of his prior strikes. That petition was dismissed with prejudice on January 24, 2001. (ER 59).

Court of Appeals Proceedings.

Mr. Ramirez appealed. The district court denied Ramirez's application for a Certificate of Appealability, but the Ninth Circuit granted a COA and appointed counsel on November 13, 2001. (ER 63-64, 65-66). The certificate of appealability was granted on two issues: (1) Does [Ramirez]'s sentence of 25 years to life for possession of 0.29 grams (less than 0.01023 ounces) of methamphetamine violate the Eighth Amendment? and (2) Has [Ramirez] exhausted this issue? (citing Schwartzmiller v. Gardner, 752 F.2d 1341, 1344 (9th Cir. 1984) (exhaustion satisfied if claim presented to highest state court before this court decides the appeal)). (Pet.

App. D21-D22).

In an unpublished decision, the Ninth Circuit remanded the case to the district court for consideration of Mr. Ramirez's Eighth Amendment claim under Reyes v. Brown, 399 F.3d 964 (9th Cir. 2005). (Pet. App. B2-B3). In Reyes, the court ordered a remand in order for the district to engage in additional fact development on the circumstances surrounding petitioner's prior convictions and for the district court to determine in the first instance whether he was entitled to relief. See Reyes, 399 F.3d at 969-70.

ARGUMENT

I

There is no need for this Court to review the question whether a federal court of appeals has the authority to issue a certificate of appealability under 28 U.S.C. § 2253, and then vacate the denial of habeas relief, based on a claim that the habeas petitioner had not raised in his prior state or federal court proceedings and did not raise in his request for a certificate of appealability because (1) the claim was fully exhausted in state court prior to the Ninth Circuit's decision, and (2) the Ninth Circuit properly determined that the claim had been sufficiently raised after liberally construing Mr. Ramirez's *pro se* filings as it was required to do.

In order to obtain a certificate of appealability ("COA . . a prisoner must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims *or* that the issues presented warrant encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 327, 336 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 481, 483, 484 (2000)). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." Id. at 336. Although the

COA should not always issue, and the "issuance of a COA must not be pro forma or a matter of course," a prisoner seeking a COA need only prove "'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." Id. at 337-38 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). This Court "do[es] not require [a] petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." Id. at 338.

The state argues here that by issuing a COA in this case on a claim not asserted in prior state of federal court proceedings, the Ninth Circuit has violated 28 U.S.C. § 2253 and this Court's decisions. (Pet. 7-8). The state believes that Mr. Ramirez failed to make a substantial showing of the denial of a constitutional right, and that it essentially "rewrote Ramirez's habeas petition to include an Eighth Amendment claim." (Pet. 7-8). Thus, with typical melodramatic rhetoric the state declares that "[o]nce again, the Ninth Circuit has departed far from the acceptable and usual course of judicial proceedings and the general practice of federal habeas review," and "[t]his Court's intervention and guidance is highly warranted and urgently needed." (Pet. 8). But contrary to the state's rhetoric, the Ninth Circuit did nothing wrong here, and the issuance of the COA conflicts with neither the law nor any precedent.

The entire premise of the state's argument is that an Eighth Amendment claim had not been presented in either the state courts or in Mr. Ramirez's federal habeas petition. The state is wrong.

Although perhaps inartfully presented in his *pro se* federal habeas petition, and his *pro se* application for a certification of appealability, it is clear that Mr. Ramirez's complaint was that his life sentence under California's Three Strikes law was unconstitutional. (ER 25-33; Pet. App.

E24-E30). Indeed, in his COA application, Mr. Ramirez argued that "a Certificate of Appealability should be issued because in a case such as this, where a possible life sentence is in the balance, would due process and justice be served, by a determination that effects the sentence, made without weighing all relevant and manditory [sic] factors?" (Pet. App. E26). He further argued,

> Petitioner submits to this court that the primary issue presented first to the state courts and again to the district court was not whether, the state court abused its discretion in denying Petitioner's motion to strike a prior conviction, but instead, whether Petitioner was denied a fundamentally fair hearing and thereby constitutional due process, when the state court failed to weigh all and/or equally, mandated factors in arriving at that decision.

(Pet. App. E27). If drafted by a trained lawyer, then it would be reasonable to argue that no Eighth Amendment claim had been raised. But Mr. Ramirez is not a trained lawyer.

This Court has made clear that pleadings filed by *pro se* litigants must be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Notably, the state relies on a Tenth Circuit case to argue that "a district court should not assume the role of advocate for a pro se litigant and may not rewrite a petition to include claims which were never presented." (Pet. 9) (citing Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir. 1999)). But in Barnett, what the Tenth Circuit explains is that, "the mandated liberal construction afforded to pro se pleadings 'means that if the court can reasonably read the pleadings to state a valid claim on which the [petitioner] could prevail, it should do so despite the [petitioner's] failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.'" 174 F.3d at 1133 (quoting Hall v. Bellmon, 935 F.2d

1106, 1110 (10th Cir. 1991)). That is all the Ninth Circuit did here in issuing the COA. It did not rewrite the petition; it merely liberally construed it, and not unreasonably so. Thus, the state's first premise for seeking review by this Court simply does not exist.[3]

Moreover, the state, relying on this Court's decision in Singleton v. Wulff, 428 U.S. 106, 120 (1976), attacks the issuance of the COA on the ground that "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." (Pet. 8). Assuming, *arguendo*, the premise of the state's argument, the state misreads this Court's holding in Singleton. Had the state just continued to the very next paragraph, it would have seen that what this Court held is "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.'" Id. at 121 (internal citations omitted). Given the Ninth Circuit's holding at the time that the California Three Strikes law violated the Eighth Amendment, it was entirely proper for the Ninth Circuit to grant a COA on the inartfully pleaded Eighth Amendment claim – even though not addressed

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[3]It is important to remember the context in which the COA was issued. The Ninth Circuit granted the COA just ten days after its decision in Andrade v. Attorney General of the State of California, 270 F.3d 743 (9th Cir. 2001) – a decision since reversed by this Court in Lockyer v. Andrade, 538 U.S. 63 (2003) – in which the court held that the California Three Strikes law violated the Eighth Amendment. The court cited to its Andrade decision in its order granting the COA. (Pet. App. D21). That the court would liberally construe a habeas petition and COA request detailing a *pro se* litigant's belief that his Three Strikes sentence is unconstitutional as raising an Eighth Amendment claim was entirely appropriate. To the extent it was error to issue the COA, that error from many years ago does not in any way demonstrate a continuing failure on the part of the Ninth Circuit to comply with the habeas laws such that intervention by this Court would be necessary.

below – since injustice might otherwise result.[4]

The state also erroneously maintains that the COA was improperly issued on a claim never raised in the state court, and that the Ninth Circuit was without authority to review an unexhausted claim. (Pet. 8-10). But the COA itself raised the question whether Mr. Ramirez's Eighth Amendment claim has been properly exhausted in state court. It is entirely appropriate for the court to issue a COA on both a constitutional claim and a procedural issue and to allow the parties to argue whether the claim was properly exhausted in state court. See Slack v. McDaniel, 529 U.S. at 478, 484-85 (determining whether a COA should issue has two components, one directed at the underlying constitutional claims, and one directed at procedural matters). Indeed, had the Eighth Amendment claim not been fully exhausted before the Ninth Circuit reached a decision in the case, then without a doubt the court would have been required to dismiss the claim. But Mr. Ramirez's Eighth Amendment was fully exhausted before the Ninth Circuit reached a decision in the case, and that is all that matters. See Sharpe v. Buchanan, 317 U.S. 238, 238-39 (1942) (where habeas claim was dismissed in district court for failing to exhaust state remedies, but claim became exhausted while petition for certiorari was pending in the Supreme Court, Court remanded case for a consideration on the merits because the "obstacle" to review has been removed); Schwartzmiller v. Gardner, 752 F.2d 1341, 1344 (9th Cir. 1984) (exhaustion satisfied if claim presented to highest state court before circuit decides appeal).

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[4]Of course, the Ninth Circuit ultimately did not grant any relief to Mr. Ramirez on an Eighth Amendment claim. It has merely remanded the case to the district court to review the record and to determine whether relief should be granted in the first instance. There is nothing inherently wrong with that.

The state appears to fundamentally misunderstand that while a COA is a gatekeeping device, its primary purpose is to expedite habeas corpus review, and save appellate work, not to create additional unnecessary litigation, as it is doing here. See Porterfield v. Bell, 258 F.3d 484, 485 (6th Cir. 2001) ("Under normal circumstances, considerations of judicial economy will discourage review of certificates of appealability: the district court will have already invested substantial time in the certification process; the parties may have already briefed the merits of the claims; and review by this court would not only duplicate the district court's efforts, [it may] . . . further delay an already lengthy process."); United States v. Marcello, 212 F.3d 1005, 1008 (7th Cir. 2000) (courts of appeals "will exercise our discretion to review the issuance of a [COA] only in rare cases because . . . '[a]n obligation to determine whether a certificate should have been issued . . . increase[s] the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan'"); Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir.), cert. denied, 531 U.S. 873 (2000) ("COA is a 'screening device' or gate-keeping tool used to conserve judicial and prosecutorial resources, and . . . once a case has proceeded to briefing and such resources have been invested, 'there is little point in scrutinizing the certificate of appealability'"). And while issuance of a COA is a jurisdictional prerequisite, the mere fact that a COA may have been (or even was) improvidently granted does not then extinguish the jurisdiction of the court to review the claims presented. See Porterfield, 258 F.3d at 485 ("a certificate of appealability, even if improvidently granted, vests jurisdiction in the court of appeals"); Owens v. Boyd, 235 F.3d 356, 358 (7th Cir. 2001) ("a defect in a certificate of appealability is not a jurisdictional flaw"); Franklin v. Hightower, 215 F.3d 1196, 1199 (11th Cir. 2000) (Supreme Court's decision in Slack v. McDaniel "remand[ing] the case in

part for the court of appeals to apply the appropriate standard [for certificate of appealability] . . . impl[ies] that defective leave to appeal neither dooms the appeal nor deprives the appellate courts of jurisdiction"); Marcello, 212 F.3d at 1008 ("even an unfounded [COA] gives us jurisdiction"); Soto v. United States, 185 F.3d 48, 52-53 (2d Cir. 1999) ("We now make explicit what our sister circuits have held and what this Court and the Supreme Court have suggested: that a certificate of appealability that is issued erroneously nevertheless suffices to confer appellate jurisdiction under § 2253. . . . [O]nce a certificate of appealability is issued, our appellate jurisdiction has vested, and this result holds even if the certificate of appealability is issued improvidently."). In addition, COAs are to be issued liberally, with any question as to whether the COA should issue resolved in favor of issuance. See Sonnier v. Johnson, 161 F.3d 941, 944 (5th Cir. 1998) (in applying AEDPA's certificate of appealability requirement, "[w]e resolve any doubt about entitlement to a COA in favor of granting it").

No doubt the state finds it a nuisance that its prisoners want to challenge their continued incarceration and that as a result it is forced to defend the Draconian sentences it has imposed for minor offenses. But the state's efforts here to preclude all avenues for challenging those excessive sentences must be rejected. There is nothing in this case – an unpublished, non-precedential decision, in which no habeas relief has been granted – that warrants any type of intervention by this Court, especially on an issue addressing the propriety of a COA which was issued several years ago when there's been no suggestion of any continuing problem. Accordingly, the writ should be denied.

II

There is no need for this Court to review the claim that it violates 28 U.S.C. § 2254(e)(2) to permit a habeas litigant to develop facts underlying his prior convictions as part of an Eighth Amendment claim when he never attempted to develop those facts as part of such a challenge in state court because (1) the claim is premised on an assumption that Mr. Ramirez did not attempt to develop facts underlying his prior convictions in state court, but the record supports no such premise, (2) by remanding the case to the district court for additional fact development and to determine whether relief should be granted in the first instance, the Ninth Circuit has done nothing that violates any statute or conflicts with any precedent, and (3) the proper forum for the state to litigate this claim is in the district court, not this Court.

The state argues that the Ninth Circuit failed to adhere to the limits imposed by 28 U.S.C. § 2254(e)(2) when it remanded this case to the district court in light of Reyes v. Brown, 399 F.3d 964 (9th Cir. 2005), a case which directed the district court to develop the factual record as to the circumstances surrounding a petitioner's prior strikes. (Pet. 11-13). It argues that the record fails to show that Mr. Ramirez ever sought to develop these facts in any state court proceeding, and thus by remanding the case and ordering a hearing the Ninth Circuit's decision here conflicts with the express provisions of 28 U.S.C. §§ 2254(d)(2) and (e)(2), as well as this Court's decisions in Holland v. Jackson, 124 S. Ct. 2436, 2737-38 (2004), and Williams v. Taylor, 529 U.S. 420, 430, 432, 435 (2000). (Pet. 11-12). But the state's argument apparently is premised on a misreading of the record and/or a fundamental misunderstanding of § 2254(e)(2), the cases interpreting the statute, and habeas fact development in general. The Ninth Circuit's decision neither conflicts with this Court's precedents nor the statute itself.

As an initial matter, the state argues that the district court will be required to hold an evidentiary hearing. (Pet. 12). That is false. The Ninth Circuit's remand only requires the

district court to develop the record further and determine if relief should be granted in the first instance. See Reyes, 399 F.3d at 969-70. If the court is able to develop the record further without the need for an evidentiary hearing, it may do so. And that very well may be the case here. Although the state argues that "[t]he record fails to show . . . that Ramirez ever sought to develop those facts [regarding the circumstances underlying his prior strikes] in any state court proceeding," (Pet. 12), that may, in fact, not be true, and in any event, would not in itself necessarily violate 28 U.S.C. § 2254(e)(2).

It is certainly true that the nature and circumstances of Mr. Ramirez's prior strike convictions is unclear from the record before the Ninth Circuit; that is why the court remanded the case to the district court for further fact development. But the fact that the record before the Ninth Circuit is incomplete does not mean the facts and circumstances of those prior strikes were not presented in any state court proceedings. Indeed, a review of the record in the Ninth Circuit suggests very strongly that Mr. Ramirez *did* develop in the state trial court the facts and circumstances of his priors.

For example, the record makes clear that Mr. Ramirez argued in the trial court that a life sentence would be cruel and unusual punishment. (ER 20). The record indicates that the sentencing judge had reviewed the facts and circumstances of the triggering and prior offenses and indicated that it "had issues" with imposing a life sentence for someone with basically "a misdemeanor drug record." (ER 23). The probation office considered the nature of Mr. Ramirez's record and thought it sufficiently minor to recommend that one of the priors be stricken and that a sentence of six years be imposed. (ER 24). In his Petition for Review of the judgment affirming his sentence in the California Supreme Court, Mr. Ramirez noted that the

sentencing court had discussed the nature of his prior strikes. (SER 7). And we know from the decision of the California Court of Appeal that "[t]he [sentencing] court looked at the facts and circumstances of the prior strike convictions as well [because] . . . [t]he court then asked for the facts of the prior burglaries in order to more closely determine defendant's background and history." (Pet. App. J50). Thus, the facts the state claims were not developed in any state court proceeding may in fact have been fully developed, and can found in portions of the record that were not part of the record in the Court of Appeals. Of course, the only way to know for sure if for the district court to figure it out – just as the Ninth Circuit has said it must. The Supreme Court is not the appropriate forum to clear up the record. Accordingly, because the entire premise of the state's claim is an assumption about the record which may not exist, the issue is simply not properly presented to this Court and review should be denied.

In any event, a habeas litigant's failure to develop the factual basis of a claim in state court does not in itself preclude an evidentiary hearing under 28 U.S.C. § 2254(e)(2). This Court has made clear that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams, 529 U.S. at 432. It is only prisoners who are at fault for the deficiency in the state court record who would lose the right to an evidentiary hearing under § 2254(e)(2). Id. at 433. Thus,

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not

depend . . . upon whether those efforts could have been successful.

Id. at 435.

At this point, because the issue has not been litigated in any lower court, we do not know whether Mr. Ramirez lacked diligence in failing to develop the record – assuming, *arguendo*, that the record wasn't developed – and should now be barred from developing the facts surrounding his prior strikes. That is an issue which also should be for the district court to decide in the first instance, not this Court.

Finally, there is nothing in the Ninth Circuit's decision to remand for further factual development that is barred by any precedent. To the contrary, in Holland v. Jackson, 542 U.S. 649, 653 (2004), this Court criticized the Sixth Circuit for granting habeas relief by relying on evidence apparently not developed in state court which neither the district court nor the Sixth Circuit had found either met the limitations of § 2254(e)(2) or was not subject to the statute because the petitioner had been diligent in pursuing the evidence. Here, by contrast, the Ninth Circuit has required the district court to look into that question. It has not, as the state appears to suggest, directed the district court to consider facts not previously developed in state court. It has merely required the district court to look into it in the first instance. And it is most appropriately in the district court – not this Court – where the state can argue the applicability of § 2254(e)(2) if it is found that the facts surrounding Mr. Ramirez's prior convictions were not developed before the state court.

In short, nothing the Ninth Circuit has done here violates the rules. And this Court is not in the habit of issuing advisory opinions or reviewing a case where the record is unclear. It is simply premature for this Court to weigh in at this time. Accordingly, the writ should be denied.

III

There is no need for this Court to review the question whether in light of Lockyer v. Andrade, federal habeas corpus relief cannot be granted on cruel and unusual punishment grounds on any California three strikes sentence since (1) this Court in Andrade explicitly held that such relief *could* be granted in an "exceedingly rare" and "extreme" case, and the Ninth Circuit has not held otherwise, and (2) the Ninth Circuit has not granted habeas relief in the instant case, or even indicated that such relief should be granted, thus it would be premature for this Court to step in at this time.

In Lockyer v. Andrade, 538 U.S. 63, 72 (2003), this Court expressly held that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Thus, the Court explained that in that particular case, "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." Id. at 73 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Solem v. Helm, 463 U.S. 277, 290 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980)). So, despite the state's protestations, it is simply not the case that this Court "implicit[ly]" held "that a federal habeas court cannot find a state court ruling, which upholds an Eighth Amendment challenge to a sentence that is properly imposed under California's Three Strikes Law, to be contrary to, or an unreasonable application of, this Court's clearly-established precedent." (Pet. 15). The state has apparently read into Andrade something that it would like to be there, but isn't.

Plainly, in the "exceedingly rare" and "extreme" case, it remains the case that a sentence

may be grossly disproportionate – and a state court's contrary conclusion may be an objectively unreasonable application of that clearly established law. Moreover, as this Court has explained, a state court decision is contrary to clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Thus, were a case to involve a set of facts materially indistinguishable from this Court's decision in Solem v. Helm, for example, in which a sentence was found to be grossly disproportionate, a state court's decision otherwise could be set aside on habeas review under 28 U.S.C. § 2254(d)(1). Finally, what constitutes "clearly established law" under § 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Andrade, 538 U.S. at 72-73 (citing Williams, 529 U.S. at 405, 413; Bell v. Cone, 535 U.S. 685, 698 (2002)). Thus, although the state here argues that this Court's decision in Ewing v. California, 538 U.S. 11 (2003), "has little, if any, precedential value regarding the federal habeas corpus review of an Eighth Amendment challenge to a sentence under California's Three Strikes Law," (Pet. 16-17), the Court's decision there is something state courts must consider since the time Ewing was issued – and any future decisions of the Court defining the contours of the gross disproportionality principle must similarly be considered.

Significantly, the state's primary argument for why "[t]his Court's intervention is warranted and urgently needed" – even though the Ninth Circuit has not granted habeas relief in this case and habeas relief may never be granted in this case – is its belief that "the Ninth Circuit continues to misunderstand the scope of its authority on habeas review," and "[t]he Ninth Circuit's recent decisions confirm that the court needs additional guidance concerning the scope

of habeas review." (Pet. 6-7). It maintains that the Ninth Circuit has "failed to be guided by the criteria presented in this Court's most recent opinion concerning habeas review of Eighth Amendment challenges in California," and that "[i]f left unchecked, the decision in the instant matter will encourage unprincipled federal habeas review of numerous sentences in California." (Pet. 17). Indeed, it stresses that even though this Court in Andrade said an Eighth Amendment challenge to a three strikes sentence would be viable in only an exceedingly rare case, "in the two years since this Court issued its decision in Lockyer v. Andrade, the Ninth Circuit has [already] identified three cases which it feels potentially qualify as exceedingly rare," the instant case, Reyes v. Brown, 399 F.3d 964 (9th Cir. 2005), a case in which the state is simultaneously seeking a writ of certiorari (No. 05-755), and Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). (Pet. 17). The state goes so far as to declare that "[t]he Ninth Circuit's willingness to find so many exceedingly rare cases in such a short period of time clearly reveals that some judges of the Ninth Circuit either choose not to apply Lockyer v. Andrade or misunderstand that decision." (Pet. 17). But the state's histrionic rhetoric is belied by reality. Its argument is misleading and fails to give the real picture.

Contrary to the state's suggestion, the Ninth Circuit has in fact only found an Eighth Amendment violation in the "exceedingly rare" case, granting relief only ***once*** since this Court's decision in Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). Notably, the state did not seek review of Ramirez v. Castro, publicly stated it believed it was an "exceedingly rare case," and acknowledged that relief was appropriate there. (Pet. App. C10 at n.3 ("We note that the California Attorney General declined to seek further review of our decision in *Ramirez*, stating that he was acting 'in the interest of justice' and calling *Ramirez* an 'exceedingly rare

case.'") (citing Henry Weinstein, *Lockyer Gives Up Three-Strikes Case*, L.A. Times, Apr. 30, 2004, at B6, *available at* 2004 WL 55909787)).

By contrast, in that same time period the Ninth Circuit, relying on Andrade, has consistently and repeatedly – indeed, at least eighty times – ***denied*** relief to a California three strikes prisoner raising an Eighth Amendment challenge to his or her life sentence, even where the petitioner had a minor triggering offense.[5] See Earle v. Runnels, No. 05-15739, 2006 WL 1049733 (9th Cir. Apr. 21, 2006) (unpublished) (receiving stolen property [a 16 year old motorcycle]); French v. Duncan, No. 04-57067, 2006 WL 679932 (9th Cir. Mar. 15, 2006) (unpublished) (shoplifting $31 worth of cigarettes); Aguirre v. Hubbard, 167 Fed. Appx. 668 (9th Cir. 2006) (possession of 0.1 gram of methamphetamine); Wallace v. Kramer, 149 Fed. Appx. 690 (9th Cir. 2005) (possession of less than half of a gram of cocaine); Hernandez v. Almeida, 146 Fed. Appx. 934 (9th Cir. 2005) (possession of 0.66 gram of cocaine); Rico v. Taylor, 146 Fed. Appx. 143 (9th Cir. 2005) (purse snatching); Webb v. McGrath, 146 Fed. Appx. 131 (9th Cir. 2005) (forgery); Nutt v. Knowles, 145 Fed. Appx. 221 (9th Cir. 2005) (50 years to life for two counts of pandering); LaCroix v. Harris, 139 Fed. Appx. 866 (9th Cir. 2005) (shoplifting five cartons of cigarettes); Rodriguez v. Lewis, 132 Fed. Appx. 134 (9th Cir. 2005) (petty theft of two candy bars and package of cheese worth about $4); Crutcher v. Garcia, 131 Fed. Appx. 116 (9th Cir. 2005) (grand theft auto); Skinner v. Roe, 130 Fed. Appx. 909 (9th Cir. 2005) (225 years to life for multiple nonviolent theft-related offenses); Sigala v. Campbell, 130 Fed. Appx. 129 (9th

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[5]This only includes those cases in which either the district court or the Ninth Circuit had granted a certificate of appealability. It does not include the numerous other cases with Eighth Amendment claims where the court concluded that not even a certificate of appealability was warranted.

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Cir. 2005)(driving under the influence); Amico v. Alameida, 122 Fed. Appx. 357 (9th Cir. 2005) (multiple theft-related offenses); Nible v. Terhune, 119 Fed. Appx. 53 (9th Cir. 2004) (resisting a park ranger); Crawford v. Small, 116 Fed. Appx. 876 (9th Cir. 2004) (second degree burglary); Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004) (petty theft of two watches with combined value of $79.98); Jones v. Castro, 111 Fed. Appx. 942 (9th Cir. 2004) (escape without force or violence); Wrobleski v. Guirbino, 111 Fed. Appx. 934 (9th Cir. 2004) (petty theft with a prior); Alfred v. Galaza, 108 Fed. Appx. 554 (9th Cir. 2004) (reckless driving while evading a peace officer); Bonner v. Cambra, 105 Fed. Appx. 147 (9th Cir. 2004) (shoplifting tool set priced at $199.99 and car polisher priced at $59.99); Mason v. Hamlet, 94 Fed. Appx 575 (9th Cir. 2004) (95 years to life for two counts of first degree burglary and one count attempted first degree burglary); Guzman v. Adams, 88 Fed. Appx. 215 (9th Cir. 2004) (petty theft of Sony Walkman); Caliendo v. Warden of California Men's Colony, 353 F.3d 1147 (9th Cir.) (second degree auto burglary), opinion withdrawn and superseded on denial of rhrg., 365 F.3d 391 (2004) (granting relief on other grounds); Gonzales v. Terhune, 84 Fed. Appx. 931 (9th Cir. 2003) (residential burglary); Bryant v. Adams, 83 Fed. Appx. 260 (9th Cir. 2003) (shoplifting $24 worth of underwear), cert. denied, 541 U.S. 1017 (2004); Quinones v. Garcia, 83 Fed. Appx. 259 (9th Cir. 2003) (75 years to life for possession of heroin for sale and possession of firearm by felon); Butler v. Hernandez, 83 Fed. Appx. 219 (9th Cir. 2003) (petty theft with a prior); Duenas v. Galaza, 83 Fed. Appx. 180 (9th Cir. 2003) (shoplifting six bottles of beer); Clark v. Lamarque, 82 Fed. Appx. 522 (9th Cir. 2003) (indecent exposure); Anderson v. Lamarque, 81 Fed. Appx. 257 (9th Cir. 2003) (shoplifting $40 worth of clothing); Joseph v. Lewis, 81 Fed. Appx. 214 (9th Cir. 2003) (possessing $5 quantity of rock cocaine); Prince v. Adams, 80 Fed. Appx. 570 (9th Cir. 2003)

(engaging in consensual sexual intercourse with 16 year old girlfriend); Reed v. Roe, 79 Fed. Appx. 991 (9th Cir. 2003) (failing to re-register as a sex offender after changing address); Huegerich v. Lamarque, 78 Fed. Appx. 610 (9th Cir. 2003); Barries v. Larson, 78 Fed. Appx. 7 (9th Cir. 2003) (grand theft); Pena v. Terhune, 77 Fed. Appx. 935 (9th Cir. 2003) (shoplifting wallet and pair of shoes with combined total value of $35.98); Clayton v. Fairman, 76 Fed. Appx. 186 (9th Cir. 2003) (burglary); Marshall v. Clark, 73 Fed. Appx. 975 (9th Cir. 2003) (shoplifting two bottles of liquor); Williams v. Galaza, 73 Fed. Appx. 941 (9th Cir. 2003) (shoplifting two pairs of jeans with total value between $60 and $64); Johnson v. Mueller, 73 Fed. Appx. 304 (9th Cir. 2003) (transportation of 0.16 gram of heroin); Clarke v. Galaza, 73 Fed. Appx. 296 (9th Cir. 2003) (driving under the influence and reckless driving); Allen v. Roe, 73 Fed. Appx. 291 (9th Cir. 2003) (shoplifting a telephone); LaCroix v. Harris, 73 Fed. Appx. 260 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Webb v. Ylst, 72 Fed. Appx. 716 (9th Cir. 2003) (possession of 0.12 gram of methamphetamine); Varela v. Adams, 72 Fed. Appx. 698 (9th Cir. 2003) (narcotics possession); Smith v. Giurbino, 71 Fed. Appx. 684 (9th Cir. 2003) (possession of cocaine); Gayles-Shealy v. Adams, 71 Fed. Appx. 648 (9th Cir. 2003) (sale of $20 of cocaine base); Aguilar v. Ayers, 69 Fed. Appx. 390 (9th Cir. 2003) (unlawfully driving a vehicle, receiving stolen property, possession of a hypodermic needle); Wallace v. Mueller, 68 Fed. Appx. 828 (9th Cir. 2003) (evading a police officer with reckless driving); Grayson v. Castro, 68 Fed. Appx. 794 (9th Cir. 2003) (50 years to life for receiving an access card without consent, forgery, second degree burglary); Blanton v. Terhune, 68 Fed. Appx. 119 (9th Cir. 2003) (possession of less than 0.1 gram of methamphetamine); Shirley v. Small, 68 Fed. Appx. 117 (9th Cir. 2003) (possession of 6.8 grams of cocaine for sale); Dodd v. Terhune, 68 Fed. Appx. 111 (9th

Cir. 2003) (31 years to life for shoplifting two videotapes and a bottle of liquor); Morgan v. Rice, 68 Fed. Appx. 111 (9th Cir. 2003) (shoplifting a baseball glove); Gregory v. Ratelle, 68 Fed. Appx. 45 (9th Cir. 2003) (burglary of a vehicle and petty theft with a prior); Thomas v. Clarke, 68 Fed. Appx. 14 (9th Cir. 2003) (receiving stolen property [checks and a license plate]); Baxter v. Roe, 67 Fed. Appx. 493 (9th Cir. 2003) (shoplifting tools); King v. Clarke, 67 Fed. Appx. 460 (9th Cir. 2003) (shoplifting two cartons of cigarettes); Bailey v. Castro, 66 Fed. Appx. 103 (9th Cir. 2003) (commercial burglary); Cook v. Galaza, 65 Fed. Appx. 106 (9th Cir. 2003) (possession of 0.16 gram methamphetamine); Turner v. Candelaria, 64 Fed. Appx. 647 (9th Cir. 2003) (receiving stolen property); Rico v. Terhune, 63 Fed. Appx. 394 (9th Cir. 2003) (shoplifting a television set worth $130); Jones v. Taylor, 63 Fed. Appx. 330 (9th Cir. 2003) (shoplifting clothing); Walters v. Fairman, 62 Fed. Appx. 190 (9th Cir. 2003) (two counts of shoplifting [a shirt and a piece of software]); Samuel v. Lewis, 62 Fed. Appx. 190 (9th Cir. 2003) (50 years to life for two counts of petty theft with a prior); Robinson v. Lewis, 62 Fed. Appx. 188 (2003) (possession of 1.31 grams of cocaine base for sale); Aguirre v. Lewis, 62 Fed. Appx. 187 (9th Cir. 2003) (commercial burglary); Venson v. Lewis, 62 Fed. Appx. 186 (9th Cir. 2003) (vehicle code violations [unlawfully driving a vehicle and evading an officer]); Johnson v. Finn, 62 Fed. Appx. 185 (9th Cir. 2003) (35 years to life for residential burglary and petty theft with a prior); Benscoter v. McGrath, 62 Fed. Appx. 184 (9th Cir. 2003) (shoplifting pair of tennis shoes); Tolbert v. Roe, 62 Fed. Appx. 184 (9th Cir. 2003) (50 years to life for two counts of second degree commercial burglary and two counts of petty theft with a prior); Andrews v. Lewis, 62 Fed. Appx. 183 (9th Cir. 2003) (shoplifting eight videotapes); Kunkle v. Galaza, 62 Fed. Appx. 182 (9th Cir. 2003) (evading an officer with reckless driving and possession of narcotics paraphernalia); Johnson v.

Pliler, 62 Fed. Appx. 180 (9th Cir. 2003) (selling or furnishing 0.15 gram rock cocaine); Romero v. Galaza, 61 Fed. Appx. 492 (9th Cir. 2003) (receiving stolen property); Robles v. Clarke, 61 Fed. Appx. 483 (9th Cir. 2003) (shoplifting a $45 camera); Anderson v. Clarke, 61 Fed. Appx. 482 (9th Cir. 2003) (possession of 6.5 grams of methamphetamine for sale); Collins v. Pliler, 61 Fed. Appx. 479 (9th Cir. 2003) (shoplifting microwave oven worth $189); Le v. Castro, 61 Fed. Appx. 321 (9th Cir. 2003) (possession of $8 worth of narcotics [14 mg. cocaine and 97 mg. heroin]).[6] Given that the Ninth Circuit has granted relief on an Eighth Amendment claim in barely one percent of the California three strikes cases in which it has reviewed such claims in the last three years – and even the state acknowledged that the one case where relief was granted was an "exceedingly rare" case – it can hardly be reasonably argued that the Ninth Circuit is some renegade court gone amok requiring intervention by this Court.

Moreover, the state appears to be complaining that the Ninth Circuit has engaged in an analysis here that is contrary to this Court's decision in Andrade. (Pet. 14). It argues that the Ninth Circuit, by comparing the sentence imposed to the "gravity of the offense, considering the nature of the triggering offense as well as the facts underlying the prior strike offenses," has demonstrated "a fundamental misconception of" Andrade. (Pet. 14). But it is the state that misreads Andrade and this Court's precedents.[7] The Ninth Circuit's post-Andrade analysis in

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[6]The Ninth Circuit has also denied habeas relief from an Arizona three sentence since Andrade. See Kenyatta v. Stewart, 152 Fed. Appx. 616 (9th Cir. 2005) (aggravated assault with a truck). The court distinguished the case from the instant case on the ground that Mr. Ramirez's triggering offense was nonviolent.

[7]Moreover, the state's argument in this Court appears to contradict its argument in the Ninth Circuit. In the Ninth Circuit, it argued that "the state courts' rulings that [Ramirez]'s sentence did not constitute cruel and unusual punishment did not contradict or unreasonably apply applicable United States Supreme Court authority," because the state courts' rulings were

Ramirez v. Castro is entirely appropriate.

In the context of a "three strikes" sentence, whether or not a particular case is the "exceedingly rare" case which violates the Eighth Amendment is entirely dependent on the facts in that case, *i.e.*, the nature and circumstances of both the triggering offense and the defendant's criminal history. To determine whether or not a defendant's crime and criminal history make the sentence imposed grossly disproportionate, it is necessary for a reviewing court to look at the facts surrounding each of the offenses involved. That is all the Ninth Circuit has said it needs to do in this case. And that is entirely consistent with this Court's Eighth Amendment jurisprudence.

For example, in Solem – a case that has not been overruled, and remains good law after Andrade – this Court explained that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292. In performing such objective analysis, this Court further endorsed consideration of "other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society," such as the "absolute magnitude of the crime" and the offender's "culpability." Id. In Harmelin, Justice Kennedy's concurring opinion, which later guided the Court in its analyses in Ewing and Andrade, compared the nature and circumstances of the offenses committed by the defendant there to other Eighth Amendment cases, particularly looking to whether an offense was "relatively minor" or "nonviolent." Harmelin, 501 U.S. at

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"[b]ased on [Ramirez]'s history and current offenses." State's Ninth Cir. Br. 16.

1001, 1002. In Ewing, the plurality looked beyond the mere fact of conviction as part of its analysis, noting that Ewing's conduct in his prior strikes involved accosting a victim in the mail room of an apartment complex, claiming to have a gun before forcing the victim back to his apartment at knife-point to steal the victim's money and credit cards. 538 U.S. at 19. The plurality then "weigh[ed] the gravity of Ewing's offense," explaining that "we must place on the scales not only his current felony, but also his long history of felony recidivism. In Andrade, the Court looked beyond Andrade's most recent convictions to detail his extensive criminal history, and held that in light of that criminal history his sentence was not outside the "contours" of the proportionality principle and thus not an extraordinary case resulting in a sentence that violated the Eighth Amendment. 538 U.S. at 66-67, 76-77.[8] Looking to the nature and circumstance of a defendant's offenses is exactly what a reviewing habeas court must do. How else is the court to determine whether it is the exceedingly rare case where the sentence imposed was grossly disproportionate and whether any state court decision to the contrary was an unreasonable application of that clearly established principle?

The state complains that such an approach is improper, yet the state declined to seek review of the Ninth Circuit's decision which established that review process for Eighth Amendment claims post-Andrade. See Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004). But regardless of the process utilized, the state now seeks to have this Court declare in this case that

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[8]This Court has looked beyond the mere fact of conviction in other contexts as well. For example, in determining whether a prior conviction meets the requirements for a sentencing enhancement, this Court has recognized that some statutes may cover conduct which would not be subject to a sentence enhancement. Where it is unclear from the statute itself whether an enhancement was proper, this Court has permitted a modified approach where a court may look beyond the statute of conviction itself to other evidence which indicates the nature of the offense. See Taylor v. United States, 495 U.S. 575, 602 (1990).

no California prisoner serving a three strikes sentence can ever qualify for habeas relief of an Eighth Amendment claim – regardless of the facts and circumstances in the case. The state's argument is premised on the erroneous belief that *all* three strikes sentences in California are necessarily constitutional in light of Andrade. But such a holding would negate the entire line of cases starting with Weems v. United States, 217 U.S. 349, 371 (1910), which was applied to the states in Robinson v. California, 370 U.S. 660, 667 (1962) (applying Eighth Amendment to states via the Fourteenth Amendment), and which was *reaffirmed* in Andrade, which hold that any sentence which is grossly disproportionate *does* violate the Eighth Amendment's proscription on cruel and unusual punishment. The mere fact that California says a sentence satisfies the Eighth Amendment does not necessarily make it so. Prisoners have the right to challenge that *ipse dixit* in the federal courts, and in the exceedingly rare case, may have that sentence declared grossly disproportionate in violation of the Eighth Amendment.

To the extent the state seeks to have this Court overrule the "clearly established" gross disproportionality principle from Weems and Solem and Harmelin and Ewing and Andrade, this case is not the appropriate vehicle since *no habeas relief has yet been granted* and we won't know if the sentence imposed here was grossly disproportionate until the lower courts can review the facts surrounding Mr. Ramirez's prior strikes. Accordingly, the writ should be denied on this issue.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(2)

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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, Acting Secretary,
California Department of Corrections, *Petitioner*,

v.

RAYMOND RAMIREZ, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-736

JEANNE S. WOODFORD, Acting Secretary,
California Department of Corrections, *Petitioner*,

v.

RAYMOND RAMIREZ, *Respondent*.

The decision below violates all notions of comity, finality, and the orderly administration of justice – the fundamental principles of habeas corpus. The law clearly specifies that a certificate of appealability ("COA") may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), this Court explained that the showing required to satisfy 28 U.S.C. § 2253(c) is that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Yet, the Ninth Circuit granted Ramirez a COA on an Eighth Amendment claim that Ramirez did not raise in either state or federal proceedings. Indeed, Ramirez did not even seek a COA on the claim certified for appeal by the Ninth Circuit. The Ninth Circuit's spontaneous advocacy on behalf of Ramirez is not merely the liberal construction of a pro se pleading as suggested by Ramirez in his Brief in Opposition but, rather, the creation of a claim out of whole cloth. The Ninth Circuit's action not only violates principles of comity and federalism, it also conflicts with the decisions of this Court and three other federal circuits (Third, Fifth, and Tenth Circuits) which apply these principles to preclude this type of spontaneous and creative advocacy on behalf of a habeas applicant. This Court's intervention is therefore necessary to clarify the terms upon which a COA may issue and to resolve a conflict among circuits.

Another basis for this Court's intervention is the Ninth Circuit's continued misunderstanding of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and, in particular, the prerequisites to authorizing an evidentiary hearing. The law makes clear that if a habeas applicant has failed to develop the factual basis of his claim in state court, the federal habeas court shall not hold an evidentiary hearing on the claim unless the applicant shows that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered by exercising due diligence, and shows that the facts underlying his claim constitute clear and convincing evidence that but for a constitutional error, no reasonable fact-finder would have found him guilty of the underlying offense. 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 430, 432, 435 (2000). The Ninth Circuit, however, vacated the district court's judgment (i.e., that Ramirez was not entitled to habeas relief based on his claim that the state trial court abused its discretion and violated due process when it refused to dismiss one of his prior strike convictions) and remanded the matter to the district court for consideration of his Eighth Amendment claim under *Reyes v. Brown*, 399 F.3d 964 (9th Cir. 2005). The Ninth Circuit's ruling wholly ignores that Ramirez never sought to develop any of those facts in any state court proceeding and that no determination had been made as to whether he was at fault for failing to develop the relevant facts in the first place or if he could satisfy one of the exceptions in 28 U.S.C. § 2254(e)(2).

Finally, in *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court held that a state court's affirmation of two consecutive terms of twenty-five years to life in prison was neither contrary to, nor an unreasonable application of, this Court's clearly established Eighth Amendment jurisprudence. This Court noted that if a gross disproportionality principle under the Eighth Amendment applies to a sentence for a term of years, the principle reserves a constitutional violation for only the exceedingly rare and extreme case, and this Court has not established a clear path for courts to follow in determining whether a particular sentence for a term of years violates the Eighth Amendment. *Id.* at 73. Nevertheless, the Ninth Circuit determined that Ramirez had a viable Eighth Amendment challenge against his term of twenty-five years to life under

California's Three Strikes Law even though the Eighth Amendment challenge was the same challenge at issue in *Andrade*.

The Ninth Circuit has once again shown its unwillingness to adhere to the limits Congress imposed, through the AEDPA, on federal habeas corpus review of state court judgements. Certiorari is warranted not only to clarify the criteria for issuing a COA and ordering an evidentiary hearing, so that neither a COA nor a ı evidentiary hearing is improvidently granted, but also to prevent Congress' intent from being thwarted once again. Nothing set forth in the Brief in Opposition undercuts that conclusion.

A. The Ninth Circuit Exceeded Its Authority In Granting A Certificate Of Appealability On An Issue That Had Not Been Raised In Prior State Or Federal Court Proceedings

As to the question of whether a federal court of appeals has the authority to issue a COA based on a claim that the habeas applicant had not raised in the district court and did not raise in a request for a COA, Ramirez does not deny that a COA may not issue unless the applicant has made a substantial showing of the denial of a constitutional right. Instead, he principally argues that the State was wrong in asserting that an Eighth Amendment claim had not been presented in state or federal court proceedings. He asserts that his complaint, inartfully presented in his federal habeas petition and his application for a COA, was that his sentence under California's Three Strikes Law was unconstitutional. Br. in Opp'n. at 8-9. The record demonstrates otherwise. Ramirez's sole complaint in state and federal court proceedings was that he was allegedly denied a fundamentally fair hearing and, thus, due process when the state trial court denied his motion to strike a prior conviction because the court failed to weigh the mandated factors in arriving at its decision. Nothing in Ramirez's habeas petition or application for COA even remotely suggests an Eighth Amendment claim as to the

sentence ultimately imposed.[1/] Pet. App. at 24-30, 41-44; Br. in Opp'n. at 9; ER at 25-33. Indeed, the Ninth Circuit's inquiry, in the order granting a COA, as to whether Ramirez had exhausted an Eighth Amendment issue, shows the Ninth Circuit had not seen the issue raised in any of Ramirez's pleadings. Pet. App. at 22. Thus, the Ninth Circuit did not simply liberally construe Ramirez's habeas petition. To the contrary, the Ninth Circuit effectively rewrote the habeas petition to include a claim that had not been raised before. Br. in Opp'n. at 9-10.

Ramirez also argues that the Ninth Circuit had the authority to review his Eighth Amendment claim because the claim was fully exhausted before the Ninth Circuit vacated the district court's judgment and remanded the matter back to the district court for consideration of the claim under *Reyes v. Brown*, 399 F.3d 964. Br. in Opp'n. at 11. Ramirez's argument misses the point. The Ninth Circuit had no authority, in the first place, to issue the COA because Ramirez had not made any showing, substantial or otherwise, of a violation of his Eighth Amendment rights. Indeed, Ramirez could not have made that requisite showing because he never raised an Eighth Amendment claim in his state or federal court proceedings. Pet. App. at 24-30, 41-44; Br. in Opp'n. at 9; ER at 25-33. Thus, whether Ramirez ultimately exhausted the Eighth Amendment claim before the Ninth Circuit rendered its decision in the case is immaterial. The fact remains that Ramirez had not exhausted his claim prior to the Ninth Circuit's granting of the COA.

Ramirez further argues that the mere fact that a COA was improvidently granted does not affect the Ninth Circuit's jurisdiction to review the claim. Br. in Opp'n. at 12-13. This attempt to finesse the Ninth Circuit's issuance of a COA on a

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1. In response to the second question presented in the instant case, Ramirez asserts that "the record makes clear that [he] argued in the trial court that a life sentence would be cruel and unusual punishment." Br. in Opp'n. at 15. Ramirez cites "ER 20" in support of his assertion. However, the record indicates that Ramirez claimed only that his sentence was cruel and unusual punishment under the California Constitution. He did not raise any claim under the Eighth Amendment to the United States Constitution.

claim that was not asserted in state or federal court proceedings or in the application for a COA fails. The legal issue pending before this Court is not whether the Ninth Circuit was justified in reviewing the Eighth Amendment claim simply because it had improvidently issued a COA on that claim. Rather, the issue is whether the Ninth Circuit had the authority to grant the COA on the Eighth Amendment claim when Ramirez had not raised that claim before in his prior court proceedings and, thus, could not have made the requisite showing of a denial of an Eighth Amendment right. As discussed in the Petition, the simple answer to that question is "no."

Ramirez's reliance on facts and circumstances that are wholly irrelevant to the question raised in the Petition merely confirms the vulnerability of the Ninth Circuit's granting of the COA and the absence of any law authorizing a federal court of appeal to issue a COA based on a claim that the habeas applicant had not raised in prior court proceedings and did not raise in the request for a COA.

B. The Ninth Circuit Failed To Adhere To The Limits Congress Imposed In The AEDPA On Federal Habeas Corpus Review By Allowing A Habeas Petitioner To Develop Facts To Support A Claim When The Petitioner Never Attempted To Develop Those Facts In State Court

On the second question presented, whether § 2254(e)(2) is violated by allowing a habeas applicant to develop facts underlying his prior convictions as part of an Eighth Amendment challenge when he never attempted to develop those facts as part of such a challenge in the state court, Ramirez's opposition to certiorari fares no better. Ramirez does not deny that a habeas applicant's failure to develop the factual basis of a claim in state court precludes an evidentiary hearing on the claim unless the applicant shows that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered by exercising due diligence, and shows that the facts underlying his claim

constitute clear and convincing evidence that but for a constitutional error, no reasonable fact-finder would have found him guilty of the underlying offense. Instead, he maintains that the State is incorrect in arguing that the district court will be required to hold an evidentiary hearing on remand. Br. in Opp'n. at 14-15. The dissent in *Reyes v. Brown*, 399 F.3d 964, undermines Ramirez's argument. Pet. App. at 16-20. Lest there be any doubt on this score, the dissent in *Reyes v. Brown* makes clear that the further development of the record mentioned in *Reyes v. Brown* amounts to an evidentiary hearing:

> It is unclear what sorts of facts the court here anticipates will be revealed during the evidentiary hearing, or what difference they will make in the proportionality inquiry. It is also unclear what facts the district court on habeas review is permitted to revisit in its "core conduct" inquiry in the face of a final state criminal judgment that Reyes committed a robbery while armed. Because *Ramirez* sets forth a balancing test, the district court must simply determine that, in consideration of the four factors, and particularly his pattern of continuing criminal behavior, Reyes' prior time spent in state prison and his earlier conviction for armed robbery render his Three Strikes sentence for perjury justified under controlling Supreme Court precedent. There is no need for an evidentiary hearing to reach that conclusion on the record already before us.

Pet. App. at 20.

Additionally, Ramirez attempts to justify the Ninth Circuit's decision to remand the matter for further development of the record by arguing that the State's position is premised on a misreading of the record. He speculates that "a review of the record in the Ninth Circuit suggests very strongly that [he] *did* develop in the state trial court the facts and circumstances of his priors. Br. in Opp'n. at 15-16 (underscore added). Ramirez's attempt to rationalize the Ninth Circuit's decision is unavailing. First, it is not clear from the record that Ramirez actually presented the facts and circumstances of his priors in the state

trial court. Second, it is not clear as to what specific facts and circumstances Ramirez purportedly presented in the state trial court. However, what is clear is that the facts he allegedly developed in the state trial court were insufficient to warrant habeas relief on Eighth Amendment grounds because the Ninth Circuit remanded the matter for further development of the record under *Reyes v. Brown*, 399 F.3d 964. What is also clear is that Ramirez may not now, for the first time, develop further facts to support his claim. The AEDPA carefully circumscribes the development of new facts in the federal courts when a petitioner has failed, as a result of lack of diligence, to develop the record in the state courts. *Williams v. Taylor*, 529 U.S. at 431-35. Nothing prevented Ramirez from further presentation of facts in the state courts, so any factual deficiency must be ascribed to his lack of diligence.

Accordingly, Ramirez was entitled to an evidentiary hearing only if he met the requirements of 28 U.S.C. § 2254(e)(2). But, there has been no showing that Ramirez's Eighth Amendment claim relied on a new rule of constitutional law or a factual predicate that could not have been previously discovered by exercising due diligence. 28 U.S.C. § 2254(e)(2). As discussed in the Petition, there is simply no way to reconcile the Ninth Circuit's decision to remand the matter for further development of the record with the provisions of the AEDPA.

C. The Ninth Circuit's Designation Of An Eighth Amendment Claim Contravenes This Court's Decision In *Lockyer v. Andrade*

As to the question of whether, in light of *Lockyer v. Andrade*, 538 U.S. 63, federal habeas corpus relief can be granted on the basis of an Eighth Amendment violation when the habeas applicant's sentence comports with California's Three Strikes Law, Ramirez's arguments are essentially the same as those raised by Santos Reyes in the brief in opposition to the petition for writ of certiorari filed in *Ornoski v. Reyes* (05-755). To this end, the State joins in the arguments made in the reply to the brief in opposition to the petition for writ of certiorari in *Reyes*.

D. Conclusion

The Ninth Circuit's refusal to follow the law, specifically the dictates of the AEDPA, undermines the careful balance between the state, on the one hand, and the federal courts, on the other, that Congress struck when it enacted that law. The Ninth Circuit's decision has consequences that extend beyond this case. The decision creates, exclusively in the Ninth Circuit, new procedural rules permitting COAs to be issued and evidentiary hearings to be held regardless of whether the habeas applicants have made the requisite showings for such COAs and evidentiary hearings. These new procedural rules are at odds with the holdings of this Court and three other federal circuits. This Court's intervention is therefore needed to resolve the conflict among the circuits and to correct the Ninth Circuit's consistently unorthodox approach to the collateral review of state court judgments.

Dated: May 25, 2006

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